IN THE SUPREME COURT OF FLORIDA

JAMES WILLIAM HAYES, JR.,

Petitioner,

Case No. SC10-2104

v.

STATE OF FLORIDA,

Respondent.

# JURISDICTIONAL BRIEF OF RESPONDENT

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## PRELIMINARY STATEMENT

Respondent, the State of Florida, the Appellant in the District Court of Appeal (DCA) and the prosecuting authority in the trial court, will be referenced in this brief as Respondent, the prosecution, or the State. Petitioner, James William Hayes, the Appellee in the DCA and the defendant in the trial court, will be referenced in this brief as Petitioner or proper name.

## STATEMENT OF THE CASE AND FACTS

The State accepts the Petitioner's statement of the case and facts.

## SUMMARY OF ARGUMENT

The First District's decision does not conflict with this Court's decision in Melbourne v. State, 679 So,2d 759 (Fla. 1996). The First District followed the steps this Court set forth in Melbourne, and determined that the trial court's ruling that petitioner's reasons for the peremptory strike were not genuine was not clearly erroneous. Because the First District followed Melbourne, there is no direct and express conflict of decisions, and this Court must dismiss this case for lack of jurisdiction.

## ARGUMENT

### ISSUE I

WHETHER THE FIRST DISTRICT'S DECISION CONFLICTS WITH THE DECSION OF THIS IN MELBOURNE V. STATE, 679 SO.2D 759 (FLA.1996)? (Restated)

### Standard of Review

Petitioner contends that this Court has jurisdiction pursuant to Fla. R. App. P. 9.030(a)(2)(A)(iv), which parallels Article V, § 3(b)(3), Fla. Const. The constitution provides: "[t]he supreme court ... [m]ay review any decision of a district court of appeal ... that expressly and directly conflicts with a decision of another district court of appeal or of the supreme court on the same question of law. The conflict between decisions "must be express and direct" and "must appear within the four corners of the majority decision." Reaves v. State, 485 So.2d 829, 830 (Fla. 1986). Accord Dept. of Health and Rehabilitative Services v. Nat'l Adoption Counseling Service, Inc., 498 So.2d 888, 889 (Fla. 1986)(rejected "inherent" or "implied" conflict; dismissed petition). Neither the record, nor a concurring opinion, nor a dissenting opinion can be used to establish jurisdiction. Reaves, supra; Jenkins v. State, 385 So.2d 1356, 1359 (Fla. 1980)("regardless of whether they are accompanied by a dissenting or concurring opinion"). In addition, it is the "conflict of decisions, not conflict of opinions or reasons that supplies jurisdiction for review by certiorari." Jenkins, 385 So.

2d at 1359. In Ansin v. Thurston, 101 So. 2d 808, 810 (Fla. 1958), this Court explained:

> It was never intended that the district courts of appeal should be intermediate courts. The revision and modernization of the Florida judicial system at the appellate level was prompted by the great volume of cases reaching the Supreme Court and the consequent delay in the administration of justice. The new article embodies throughout its terms the idea of a Supreme Court which functions as a supervisory body in the judicial system for the State, exercising appellate power in certain specified areas essential to the settlement of issues of public importance and the preservation of uniformity of principle and practice, with review by the district courts in most instances being final and absolute.

**A. Whether the First District's decision expressly and directly conflicts with Melbourne v. State 679 So.2d 759 (Fla. 1996), regarding whether there was probable cause that a crime occurred.**

There is no conflict between the First District's decision in the case at bar and Melbourne v. State, 679 So.2d 759 (Fla.1996). The First District followed Melbourne. The First District stated that:

> Florida's three-step procedure for peremptory challenge objections is set out in Melbourne v. State, 679 So.2d 759 (Fla.1996). First, the objecting party makes a timely objection and requests that the court ask the striking party to provide a race-neutral or gender-neutral reason for striking the potential juror. Id. at 764. Next, the striking party gives an explanation for the peremptory strike. Id. If the reason given is facially race neutral or gender neutral, the court then determines whether, "given all the circumstances surrounding the strike, the explanation is not a pretext" for discrimination. Id. (footnote omitted). The question for the court is not whether the reason given for the strike is reasonable, but whether it is genuine. Id. Reasonableness is, however,

> pertinent to that assessment. Id. at 764 n. 9. Other relevant factors include the make-up of the venire and prior strikes against the racial or gender group of which the challenged juror is a member, as well as whether the explanation given for the challenge is equally applicable to other jurors who were not challenged. Id. at 764 n. 8. Peremptory challenges are presumed to be nondiscriminatory. Id. at 764. But trial courts have broad discretion in judging whether such challenges are proper. See Franqui v. State, 699 So.2d 1332, 1334-35 (Fla.1997). "[T]he trial court's decision turns primarily on an assessment of credibility" and will not be disturbed on appeal "unless clearly erroneous." Melbourne, 679 So.2d at 764-65.

Hayes v. State, 45 So.3d 99, 102-103 (Fla. 1st DCA 2010)(footnotes omitted). The First District found that the first two steps of Melbourne were satisfied. Id. at 103. As to the third step, the trial court found that petitioner's explanation for the strike, while race neutral, was not genuine. Id. The First District affirmed the trial court's decision finding that:

> We cannot definitively say the trial court's ruling is clearly erroneous and wholly unsupported by the record. The transcript of voir dire reveals nothing about the jurors the defense successfully removed by peremptory challenge prior to the attempted strike of juror Haupt. Thus Mr. Hayes cannot demonstrate, for example, the prior strikes included few or no women. But the transcript does show defense counsel's initial response to the request for a gender-neutral justification for removing juror Haupt was "I don't have a gender-neutral reason." And although counsel recovered with "She has some relatives or whatnot in law enforcement," two other individuals with family in law enforcement remained on the jury. These circumstances, together with the court's assessment of defense counsel's credibility (which we are not in a position to second guess) tend to support the denial of the peremptory

> challenge. Because we see no clear error here, we are constrained to uphold the lower court's ruling.

Hayes, at 104. Accordingly, while petitioner may disagree with the First District's application of Melbourne to the facts of this case, the First District clearly applied the principals of law set forth in Melbourne. Therefore, there is not direct and expressed conflict, and this Court must dismiss this case for lack of jurisdiction.

## CONCLUSION

Based on the foregoing reason, the State respectfully requests this Honorable Court decline to exercise jurisdiction.

## SIGNATURE OF ATTORNEY AND CERTIFICATE OF SERVICE

I certify that a copy hereof has been furnished to Gail Anderson, Assistant Public Defender, gail.anderson@flpd2.com by EMAIL on _17th___ day of November, 2010.

Respectfully submitted and served,

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[AGO# L10-1-28466]

## CERTIFICATE OF COMPLIANCE

I certify that this brief complies with the font requirements of Fla. R. App. P. 9.210.

_____
Trisha Meggs Pate
Attorney for State of Florida

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APPENDIX

Hayes v. State, 45 So.3d 99 (Fla. 1st DCA 2010)